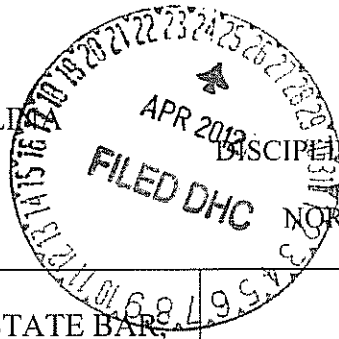


STATE OF NORTH CAROLINA

WAKE COUNTY



BEFORE THE

DISCIPLINARY HEARING COMMISSION

OF THE

NORTH CAROLINA STATE BAR

12 DHC 17

THE NORTH CAROLINA STATE BAR,

Plaintiff

v.

KENNETH P. ANDRESEN, Attorney,

Defendant

COMPLAINT

Plaintiff, complaining of Defendant, alleges and says:

1. Plaintiff, the North Carolina State Bar ("Plaintiff" or "State Bar"), is a body duly organized under the laws of North Carolina and is the proper party to bring this proceeding under the authority granted it in Chapter 84 of the General Statutes of North Carolina, and the rules and regulations of the North Carolina State Bar promulgated thereunder.

2. Defendant, Kenneth P. Andresen ("Defendant" or "Andresen"), was admitted to the North Carolina State Bar on 23 August 1980, and is, and was at all times referred to herein, an attorney at law licensed to practice in North Carolina, subject to the rules, regulations and Rules of Professional Conduct of the North Carolina State Bar and the laws of the State of North Carolina.

3. During all or a portion of the relevant periods referred to herein, Defendant was actively engaged in the private practice of law in the city of Charlotte, Mecklenburg County, North Carolina.

#### **FIRST CLAIM FOR RELIEF**

4. Paragraphs 1 – 3 are re-alleged and fully incorporated as if set forth herein.

5. Andresen represented B. Johnson in Johnson's effort to transfer a mining permit from the name of Barringer Sand, LLC a South Carolina entity ("SC Barringer Sand"), to Johnson. Johnson needed the permit to mine sand on land he owned in Gaston County.

6. Andresen incorporated Barringer Sand, LLC in North Carolina ("NC Barringer Sand").

7. Andresen prepared an operating agreement for NC Barringer Sand which provided that Johnson and his son would each have a 24% interest in NC Barringer Sand.

8. The operating agreement further provided that Andresen would have a 22.5% interest in NC Barringer Sand. Pursuant to the agreement, three other individuals owned the remaining interest in NC Barringer Sand.

9. Andresen failed to advise Johnson in writing of the desirability of seeking the advice of independent legal counsel concerning entering into this business relationship with Andresen before Andresen took an interest in NC Barringer Sand.

10. Andresen failed to give Johnson a reasonable opportunity to seek the advice of independent legal counsel.

11. SC Barringer Sand transferred the mining permits to NC Barringer Sand.

12. Andresen sought a bank loan for NC Barringer Sand. Johnson was required to provide collateral for the bank's loan to NC Barringer Sand and thus provided to the bank a deed of trust on real property he owned.

13. Disagreements arose between Johnson and the other members of NC Barringer Sand.

14. Andresen and the other members of NC Barringer Sand suggested to Johnson that he should resign from NC Barringer Sand.

15. Johnson resigned from NC Barringer Sand.

16. Johnson had to retain another attorney to extricate him from the financial matters related to NC Barringer Sand.

17. NC Barringer Sand is still an active company and Andresen is a member/manager of the company.

.....  
THEREFORE, Plaintiff alleges that Defendant's foregoing actions constitute grounds for discipline pursuant to N.C. Gen. Stat. § 84-28(b)(2) in that Defendant violated the Rules of Professional Conduct as follows:

- a) by creating NC Barringer Sand on behalf of his client, Johnson, and taking an ownership interest in the company without advising Johnson in writing of the desirability of seeking the advice of independent legal counsel about giving Andresen an interest in NC Barringer Sand and without giving Johnson a reasonable opportunity to seek the advice of independent legal counsel, Andresen entered into a prohibited business transaction with a client in violation of Rule 1.8(a).

## **SECOND CLAIM FOR RELIEF**

18. Paragraphs 1 - 17 are re-alleged and fully incorporated as if set forth herein.

19. Andresen represented W. Markham, Jr. Markham was accused of embezzling from his employer.

20. Andresen briefly represented Markham against the criminal allegations of embezzlement, but the majority of the representation was focused on helping Markham obtain release from a deed of trust Markham provided to secure his payment of restitution for the embezzlement.

21. Andresen obtained a temporary restraining order and preliminary injunction on behalf of Markham. Markham was required to post a \$17,000 civil bond in connection with the TRO and preliminary injunction.

22. One of Markham's brothers provided \$16,000 of the bond. Markham's son provided the remaining \$1,000 of the bond.

23. Although Markham's family advanced the funds to Andresen, they allowed Markham to communicate with Andresen about the use of the funds and to direct disbursement of the funds. Markham's family did not communicate with Andresen.

24. Markham told his brothers that their bond payments would be refunded. Therefore, Markham's family believed that the \$17,000 would be refunded to them.

25. After the civil case was resolved, the Clerk refunded the \$17,000 bond to Andresen as counsel for Markham.

26. At the time that the bond was refunded, Markham owed outstanding legal fees to Andresen in excess of \$20,000.00.

27. Markham told Andresen that his brothers would pay his outstanding legal fees at a rate of \$5,000 per month until the legal fee was paid in full.

28. Andresen accepted Markham's offer to have his legal fee repaid at the rate of \$5,000 per month but told Markham that he would first apply the refunded bond money to Markham's outstanding bill to reduce the amount of legal fees owed.

29. Andresen failed to maintain the \$17,000 in his trust account until Markham directed disbursement of the \$17,000 bond refund. Instead, on 27 February 2007 Andresen applied the \$17,000 to Markham's outstanding legal bill.

30. Andresen did not have authority from Markham's family to apply the \$17,000 to Markham's outstanding legal fees.

31. Markham's brothers never recovered any of the money they advanced for the civil bond.

THEREFORE, Plaintiff alleges that Defendant's foregoing actions constitute grounds for discipline pursuant to N.C. Gen. Stat. § 84-28(b)(2) in that Defendant violated the Rules of Professional Conduct as follows:

- a) by failing to maintain in his trust account the \$17,000 returned by the Clerk and instead applying the funds to outstanding legal fees Markham owed to Andresen, Defendant failed to maintain entrusted funds in accordance with Rule 1.15 in violation of Rule 1.15-2(a), and used entrusted property for his personal benefit in violation of Rule 1-15-2(j).

### **THIRD CLAIM FOR RELIEF**

32. Paragraphs 1 - 31 are re-alleged and fully incorporated as if set forth herein.

33. In March 2007, Andresen represented Greg Grainger in a criminal matter. Five thousand dollars (\$5,000) was deposited into the firm's trust account on Grainger's behalf for payment of costs and expenses related to this representation.

34. The \$5,000 deposit was not for payment of any legal fees.

35. Between 28 March 2007 and 11 July 2007 Andresen applied the \$5,000 to attorney's fees Grainger owed to the firm for its representation of him in other matters.

36. After the criminal case concluded, Grainger called Andresen repeatedly over a ten day period to request a refund of the unused portion of his \$5,000 deposit.

37. Andresen failed to promptly respond to Grainger's request for a refund.

THEREFORE, Plaintiff alleges that Defendant's foregoing actions constitute grounds for discipline pursuant to N.C. Gen. Stat. § 84-28(b)(2) in that Defendant violated the Rules of Professional Conduct as follows:

- a) by failing to promptly respond to Grainger's request for refund, Defendant failed to promptly comply with a reasonable request for information in violation of Rule 1.4(a); and
- b) by failing to maintain Grainger's \$5,000 in trust for the purpose received and instead applying it to outstanding legal fees Grainger owed to Andresen's firm for its representation of him in other matters, Defendant failed to maintain entrusted funds in accordance with Rule 1.15 in violation of Rule 1.15-2(a), and used entrusted property for his personal benefit in violation of Rule 1.15-2 (j).

#### **FOURTH CLAIM FOR RELIEF**

38. Paragraphs 1 – 37 are re-alleged and fully incorporated as if set forth herein.

39. Andresen represented investors in the Marvin Development Group, II LLC (“Marvin Development”) project in an action against a Marvin Development officer.

40. Robert Greene, Jr. was Andresen’s co-counsel in the Marvin Development litigation.

41. Andresen’s agreed upon legal fee for the Marvin Development litigation (to be shared with Greene) was 1/3 of any recovery obtained for the Marvin Development investors.

42. Andresen reached a settlement with the Marvin Development officer on behalf of the Marvin Development investors.

43. The proceeds of the Marvin Development litigation settlement were deposited into Andresen’s trust account ending in no. 3422 as follows:

- a. On 26 January 2007 - \$20,000.00.
- b. On 8 February 2007 - \$20,000.00.
- c. On 28 February 2007 - \$60,368.22.
- d. On 9 March 2007 - \$20,000.00.
- e. On 26 April 2007 - \$20,000.00.
- f. On 18 July 2007 - \$25,000.00.
- g. On 16 October 2007 - \$3,114,081.40.

44. Andresen disbursed funds from the Marvin Development litigation settlement proceeds to himself and Robert Greene, Jr. as follows:

- a. March 2007 – check no. 1044 for the amount of \$16,711.31 payable to Andresen & Assoc.
- b. March 2007 – check no. 1043 for the amount of \$16,711.31 payable to Robert Greene, Jr.
- c. 27 April 2007 – check no. 1047 in the for the amount of \$3,333.00 payable to Andresen & Assoc.
- d. 29 May 2007 – check no. 1051 for the amount of \$3,333.00 payable to Robert Greene, Jr.
- e. 25 July 2007 – check no. 1065 for the amount of \$8,325.00 payable to Andresen & Assoc.
- f. 12 September 2007 – check no. 1078 for the amount of \$50,000.00 payable to Andresen & Assoc. Escrow.
- g. 21 November 2007 – check no. 1086 for the amount of \$10,000.00 payable to Andresen & Assoc.
- h. 23 November 2007 – check no. 1084 for the amount of \$551,505.69 payable to Robert Greene, Jr.

- i. 26 November 2007 – check no. 1099 for the amount of \$75,000.00 payable to Andresen & Assoc.
- j. 27 November 2007 – check no. 1100 for the amount of \$25,000.00 payable to Andresen & Assoc.
- k. 30 November 2007 – check no. 1101 for the amount of \$35,000.00 payable to Andresen & Assoc.
- l. 11 December 2007 – check no. 1102 for the amount of \$88,000.00 payable to Andresen & Assoc.
- m. 13 December 2007 – check no. 1103 for the amount of \$5,000.00 payable to Andresen & Assoc.
- n. 28 December 2007 – check no. 1106 for the amount of \$10,000.00 payable to Andresen & Assoc.
- o. 10 January 2008 – wire to Kenneth Andresen for the amount of \$329,078.49.

45. The following checks made payable to Robert Greene, Jr. and Andresen failed to indicate on the items the client balance on which these items were drawn.

- a. Check no. 1043 payable to Robert Greene, Jr.
- b. Check no. 1044 payable to Andresen & Assoc.
- c. Check no. 1047 payable to Andresen & Assoc.
- d. Check no. 1065 payable to Andresen & Assoc.
- e. Check no. 1078 payable to Andresen & Assoc.
- f. Check no. 1086 payable to Andresen & Assoc.
- g. Check no. 1099 payable to Andresen & Assoc.
- h. Check no. 1100 payable to Andresen & Assoc.
- i. Check no. 1101 payable to Andresen & Assoc.
- j. Check no. 1102 payable to Andresen & Assoc.

46. After his fee was earned, which was at least as of 23 November 2007, Andresen failed to promptly withdraw from his trust account the full amount of his legal fee for the Marvin Development litigation.

47. On or about 28 September 2007, the bank erroneously deducted from his trust account a loan payment for Andresen for the amount of \$1,384.54. In the past, this loan payment had been deducted from Andresen's operating account.

48. Although Andresen's assistant contacted the bank to seek correction of the erroneous loan payment, Andresen failed for several months to provide funds to cover the \$1,384.54 loan payment. Thus, after 10 January 2008 Andresen used \$1,384.54 of other clients' entrusted funds for his personal benefit.

THEREFORE, Plaintiff alleges that Defendant's foregoing actions constitute grounds for discipline pursuant to N.C. Gen. Stat. § 84-28(b)(2) in that Defendant violated the Rules of Professional Conduct as follows:

- a) by failing to promptly withdraw his Marvin Development litigation fee from his trust account, Andresen commingled his funds with entrusted client funds in violation of Rule 1.15-2(f);
- b) by failing to indicate on the trust account checks listed in paragraph 45(a)-(j) above the client balance on which these items were drawn, Andresen failed to indicate on the item the client balance on which the item was drawn in violation of Rule 1.15-2(h);
- c) by failing to provide funds to cover the bank's erroneous \$1,384.54 payment of Andresen's loan, Andresen used entrusted property for the personal benefit of one other than the legal or beneficial owner of that property in violation of Rule 1.15-2(j).

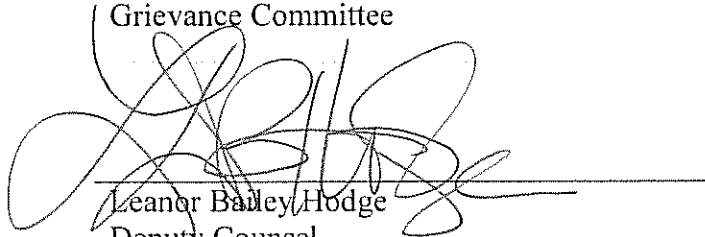
WHEREFORE, Plaintiff prays that:

- (1) Disciplinary action be taken against Defendant in accordance with N.C. Gen. Stat. § 84-28(c) and 27 N.C.A.C. 1B § .0114 as the evidence on hearing may warrant;
- (2) Defendant be taxed with the fees and costs permitted by law in connection with this proceeding; and
- (3) For such other and further relief as is appropriate.

This the 25<sup>th</sup> day of April, 2012.



Margaret M. Hunt, Chair  
Grievance Committee



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